BEFORE THE ARIZONA PUBLIC REGULATION COMMISSION

WILLIAM A. MUNDELL
Commissioner
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

AT&T'S AND WORLDCOM'S REQUEST TO SUPPLEMENT THE RECORD REGARDING CHECKLIST ITEMS 3, 7 AND 10

AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of TCG Phoenix ("AT&T") and WorldCom, Inc. ("WorldCom") (collectively referred to herein as "Joint Intervenors") hereby supplement the record in the proceeding as provided for in the Commission's Procedural Order, dated March 26, 2001 to address disputed issues from Section 271 workshops in other states on Checklist Items 3, 7 and 10. Specifically, the following issues have been disputed by AT&T and WCOM in other Section 271 workshops and have either been resolved or gone to impasse: 1) Checklist Item 3 – access to private landowner/property owner agreements, time for responding to ROW access requests, definitions of "ROW" and "ownership and control;" 2) Checklist Item 7 – references to "license" and "solely" and forecasting provisions; 3) Checklist Item 10 – access to the CNAM database.[1]

[1] This issue has been raised by WCOM, not AT&T.

The Joint Intervenors have addressed each of these issues in the argument set forth below. Because the supplemental record on these issues is extensive, it is impossible to provide cross-references in the argument below to all of the relevant exhibit cites. However, the Joint Intervenors have provided an Index of submissions from the records of other workshops that have been attached as part of this filing as an aid. This Index identifies, by issue category, each submission and the relevant page numbers in each submission where each issue addressed herein was discussed.

A. Checklist Item 3 – Access to Poles, Ducts, Conduits and Rights of Way.

In workshops on ROW in other states, an issue arose concerning Qwest's provisioning of nondiscriminatory access to ROW. In the Colorado workshop on this checklist item, Qwest asserted that it does not have any interest that is assignable to CLECs pursuant to its obligations under Section 251(b)(4) of the Act.[2] Qwest acknowledged that it has to provide access to any ROW that it owns or controls, but claimed that the agreements that it has with property owners do not allow Qwest to assign its interest and, as a result, that is the end of the inquiry. Alternatively, Qwest has argued that if Qwest had ROW that it will provide CLECs access to it, but it claims the agreements it has entered into with private landowners, at least in the multiple dwelling unit ("MDU") context, do not convey ROW and, therefore, Qwest has no obligation to satisfy under Section 251(b)(4).[3] CLECs have disputed these claims. Section 271(c)(2)(B)(iii) requires BOCs to provide "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable

[2] Colorado Transcript, 06/29/00, pp. 157-159.
[3] Oregon Transcript, 08/09/00, pp. 25-26.

rates in accordance with the requirements of section 224."[4] Thus, it is irrelevant whether these private agreements allow Qwest to assign or convey its interest or a ROW. What is relevant is: Does Qwest own or control the ROW? As a result of these discussions in the workshops in other states, it became obvious that access to these agreements with private landowners/property owners are vital to ascertaining what ROW Qwest owns or controls and the terms and conditions upon which Qwest has been afforded access. Without access to such agreements, CLECs and, ultimately, Commissions cannot ascertain the scope of Qwest's obligation under Section 251(b)(4) and the intended applicability of this section of the Act would be largely gutted.

The Joint Intervenors contend, and other Commissions have agreed, that access to these agreements is an integral component of Qwest' compliance with Section 271(c)(2)(B)(iii) and that the disputed issues that remain relating to such access must be considered and resolved before Qwest can be deemed to be in compliance with Checklist Item 3.[5]

To that end, Qwest, in the Colorado workshop, AT&T and the Colorado Office of Consumer Counsel engaged in offline discussions to determine if the parties could come up with a compromise regarding CLEC access to these agreements with private landowners/property owners. During the course of these discussions, it was agreed that CLECs would execute an Access Agreement (in lieu of the Quitclaim that is now appended to the Arizona SGAT of record that was filed on July 21, 2000), although as

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[4] *Application of BellSouth Corporation pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in region-inter LATA services in Louisiana*, CC Docket No. 98-121, FCC 98-271, released October 13, 1998, ¶ 171 *("BellSouth Second Louisiana Order")*.

[5] See rulings by other Commissions reference in subsection 4 below.

will be detailed below, the precise content of the Access Agreement was not fully resolved.

In the Arizona SGAT recently submitted by Qwest in this proceeding, Qwest did not include any of the language relating to this Access Agreement. This Access Agreement is, and reverences to it in the body of the SGAT were, specifically included in the Multistate SGAT filed by Qwest with its rebuttal testimony in the Multistate workshop. Indeed, Qwest, AT&T, WCOM and others conceptually agreed to the use of the Access Agreement last August during the Colorado workshop on Checklist Item 3. Thus, reference to the Access Agreement should be incorporated into the Arizona SGAT in the manner reflected in Attachment A. In addition, the Joint Intervenors attach a redline version of Section 10.8 that was submitted by Qwest as an attachment to the Rebuttal Testimony of Thomas R. Freeberg in the Seven (then Six) State Collaborative Section 271 Workshops (the "Multistate Workshop") on November 3, 2001 (Attachment B). This is the last filing by Qwest of its proposed SGAT language on Section 10.8. A comparison of Attachment A and B provides support for the Joint Intervenors' position.

Aside from this issue, there remain, however, several disputed issues with respect to the Access Agreement. Qwest has now agreed to provide CLECs with all copies of its ROW and MDU agreements, however, Qwest seeks to impose significant conditions that CLECs must comply with before such agreements will be provided to the CLEC. Rather than freely making the private landowner agreements available to CLECs, Qwest has proposed terms and conditions in the Access Agreement that require CLECs to go through the unnecessary and burdensome effort of gaining 1) the landowner's consent before access to the agreements will be afforded, in cases where the underlying

agreement has not been recorded and 2) the landowner's agreement to provide notice and opportunity to cure before Qwest will afford CLECs access to ROW agreements.[6] These issues have gone to impasse in Colorado, Washington, Oregon and the Multistate workshops. Set forth below is argument regarding these two disputed issues.

In addition, Qwest has proposed new definitions of "ROW" and "ownership and control" which are contrary to law and inappropriate. These definitions were disputed in the Multistate workshop. This issue is addressed in subsection 5 below.

Finally, Qwest seeks to limit its obligation to respond to requests for access to ROW beyond the 45-day time frame established by the FCC. This issue has been disputed and briefed in all of the other workshops. This disputed issue is addressed in subsection 6 below.

1. Legal Requirements.

Section 271(c)(2)(B)(iii) requires BOCs to provide "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[7]

In the *Local Competition Order*, the FCC interpreted section 251(b)(4) as requiring nondiscriminatory access to incumbent local exchange carriers' ("LECs") poles, ducts, conduits and rights-of-way for competing providers of telecommunications services in accordance with the requirements of section 224.[8] The FCC has reinforced the requirements set out in its *Local Competition Order* in its recent *Order on*

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[6] Qwest also proposed that the CLEC must record whatever interest they obtain in Qwest's MDUs. AT&T objected to the legality and onerous nature of this requirement. Qwest has now withdrawn this requirement.

[7] *BellSouth Second Louisiana Order*, ¶ 171.

[8] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 99-325 (rel. Aug. 8, 1996) ("Local Competition Order").

Reconsideration.[9] In addition, the FCC more recently interpreted the revised requirements of Section 224 governing rates, terms and conditions for telecommunications carriers' attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.[10]

Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[11] Notwithstanding this requirement, Section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[12]

Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for "pole attachments."[13] Section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are "just and reasonable."[14] Notwithstanding this general grant of authority, Section 224(c)(1) states that "[n]othing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section

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[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Reconsideration, FCC 99-266 (rel. Oct. 26, 1999) ("Order on Reconsideration").
[10] *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments,* CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) ("Pole Attachment Telecommunications Rate Order").
[11] 47 U.S.C. § 224(f)(1). Section 224(a) defines "utility" to include any entity, including a LEC, that controls, "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).
[12] 47 U.S.C. § 224(f)(2).
[13] Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).
[14] 47 U.S.C. § 224(b)(1).

224(f)], for pole attachments in any case where such matters are regulated by a State." In addition, Section 224 expressly excludes incumbent LECs, such as Qwest from the class of persons entitled to such access.[15]

In its *Bell South Second Louisiana* decision, the FCC concluded that BellSouth demonstrated that it was providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms and conditions by demonstrating that it has established nondiscriminatory procedures for: (1) evaluating facilities requests pursuant to Section 224 of the Act and the *Local Competition Order*; (2) granting competitors nondiscriminatory access to information on facilities availability; (3) permitting competitors to use non-BellSouth workers to complete site preparation; and (4) compliance with state and federal rates.

The Commission also concluded that:

> consistent with the Commission's regulations implementing section 224, we conclude that BellSouth must provide competing telecommunications carriers with access to its poles, ducts, conduits, and rights-of-way on reasonable terms and conditions comparable to those which it provides itself and within reasonable time frames. Procedures for an attachment application should ensure expeditious processing so that "no [BOC] can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications . . . equipment by those seeking to compete in those fields."[16] Pursuant to the Commission's rules, BellSouth must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted.[17] If BellSouth denies such a request, it must do so in writing and must enumerate the reasons access is denied, citing one of the permissible grounds for denial discussed above. [18]

A lack of capacity on a particular facility does not entitle an RBOC to deny a request for access. Sections 224(f)(1) and 224(f)(2) require an RBOC to take all

[15] *See* 47 U.S.C. § 224(a)(5) and 224(f)(1) and Local Competition Order, ¶ 1231.
[16] *Local Competition Order*, ¶ 1123.
[17] 47 C.F.R. § 1.1403(b).
[18] *BellSouth Second Louisiana Order*, ¶ 176.

reasonable steps to accommodate access in these situations. If a telecommunications carrier's request for access cannot be accommodated due to a lack of available space, an RBOC must modify the facility to increase capacity under the principle of nondiscrimination.[19]

2. Qwest's Consent Requirement Is Contrary to Law and a Barrier to Entry.

The first dispute concerns Qwest's proposal that it will provide a copy of any ROW agreement in its possession that has not been recorded **only** after a CLEC has obtained the consent of the landowner to the disclosure of the ROW agreement. This consent requirement is not required by the law and is inconsistent with sound public policy. Further, because such consent is not required of Qwest itself, or its affiliates, Qwest's consent proposals for CLECs are discriminatory, in violation of both state and federal law. The consent requirement Qwest seeks to impose would create unreasonable costs and impose significant delays on CLEC access to ROW and provisioning of service using such ROW, which would constitute a significant barrier to offering the tenants or other customers a competitive alternative.

In other workshops, Qwest has asserted as its sole basis for this consent requirement that there is some purported "expectation" of the landowner that these "dealings are private." Qwest has never presented any evidence of such an expectation. To the contrary, the ROW agreements that Qwest has provided to CLECs in the workshops (including Qwest's own Agreement for New Multi-Tenant Residential Properties) do not explicitly require consent to the disclosure of the terms of the agreement to third parties, and do not explicitly require written and acknowledged prior

[19] *Local Competition Order,* ¶ 1224.

consent.[20] Qwest's form agreement contains a restriction on assignment that prohibits the landowner, not Qwest, from assigning the contract.[21] This provision is included for the benefit of Qwest; the agreement does not include a corresponding promise for the benefit of the landowner. Other ROW documents provide for additional requirements relating to assignment. For example, Qwest's Form Agreement for New Multi Tenant Properties contains a provision that requires the landowner, not Qwest, to notify Qwest of a transfer of the subject property.[22] These agreements clearly contemplate that Qwest may assign ROW access without restraint.

Nor do those agreements contain nondisclosure requirements. The Joint Intervenors agree that where there is an explicit nondisclosure or consent provision that applies, consent may be required. Absent such a provision, the landowner can have no legal expectation of nondisclosure. That is basic contract law. Essentially, Qwest's proposal creates a presumption that all such ROW agreements are confidential and subject to a prohibition (which is presumably absolute) against disclosure. Such a presumption is inappropriate and imposes a needless burden on CLECs to obtain disclosure. More fundamentally, in the absence of an express provision restricting disclosure of a ROW agreement, there is no duty not to disclose the agreement.

The FCC requires RBOCs to provide access to its maps, plats and *other relevant data* to avoid "the need for costly discovery in pursuing a claim of improper denial of access."[23] It has not authorized RBOCS to condition such access, such as the consent or

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[20] *See* Attachment B to Direct Testimony of Dominick Sekich filed in the Multistate Workshop. The Agreement for New Multi-Tenant Residential Properties contains a provision to limit the disclosure of confidential and proprietary information. Such a provision contemplates limiting disclosure of information either party receives under the agreement, not the agreement itself.
[21] *See* Qwest's Form Agreement for New Multi Tenant Properties, ¶ 17.2.
[22] *See id.* ¶ 13.
[23] *Local Competition Order*, ¶ 1223.

opportunity to cure obligations Qwest seems to impose, in any way. Indeed, the imposition of such conditions creates unnecessary barriers to competition by requiring CLECs to negotiate a separate agreement with the landowner, and significantly raises the cost of entry for CLECs.

Finally, Qwest's proposal does not address the issue of Qwest's obligation with respect to future ROW agreements. In future ROW agreements that Qwest enters into, Qwest must be required to obtain a contractual provision that affirmatively allows the disclosure of these agreements to third parties without prior written consent. Such a requirement will avoid all of these consent issues raised by Qwest. If Qwest believes that its agreements may impose some kind of presumptive covenants of non-disclosure, Qwest should, as part of its obligations to provide the access to ROW, clarify its obligations to disclose ROW agreements with prospective landowners when entering into such agreements.

3. Qwest's Requirement that CLECs Obtain the Agreement of the Landowner to Provide Qwest with Notice and an Opportunity to Cure is Unlawful, Unnecessary and Burdensome.

Qwest has revised its SGAT to include extensive new requirements for a CLEC to obtain the agreement of a property owner to provide notice and an opportunity to cure supposed "defaults" of a CLEC transfer of any rights of access to a ROW. Qwest argues that these landowner agreements are essential to protect it from a panoply of as yet unrealized risks. As explained below, these new requirements are generally unnecessary and create extraordinarily time- and resource- intensive burdens on landowners as well as CLECs who attempt gain nondiscriminatory access to rights of way as provided under the Act.

Qwest's proposals require CLEC's to obtain the agreement of an owner whose property is subject to an easement, license, "Agreement for New Multi-tenant Residential Properties" or similar right of way agreement ("ROW agreement") to provide notice and opportunity to cure any possible default by a CLEC before permitting a CLEC to have access to the ROW.[24] Qwest's proposal requires the CLEC to obtain such landowner agreement at an early stage in the access process.[25]

The law does not mandate that CLECs obtain an agreement from the landowner to provide Qwest with notice and opportunity to cure before Qwest must provide access. The Act mandates that Qwest provide access to that which it owns or controls. Neither the Act nor the FCC's rules and orders impose any requirement for a CLEC to obtain the agreement of a landowner to provide notice and an opportunity to cure to Qwest or further agreement of a landowner for access to rights of way.[26] Indeed, the law requires that Qwest must establish nondiscriminatory processes to expedite access to ROWs: "Procedures for an attachment application should ensure expeditious processing so that "no [BOC] can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications . . . equipment by those seeking to compete in those fields."[27]

Qwest asserts that this notice and an opportunity to cure agreement is require to adequately protect Qwest's interests. Qwest's assertion is entirely unfounded. The SGAT presently contains numerous indemnification and liability provisions intended to protect Qwest in the event a CLEC acts or fails to act in a way that exposes Qwest to

[24] *See* SGAT Exhibit D, ¶ 2.2, and Exhibit D, Attachment 4.
[25] SGAT Exhibit D ¶ 2.2.
[26] 47 U.S.C. § 251(b)(4); *Local Competition Order,* ¶¶ 1119 – 1158.
[27] *Bell South Second Louisiana Order,* ¶ 176 (citing *Local Competition Order*, 11 FCC Rcd at 16067).

liability.[28] Nothing more is required. Qwest's claim that it cannot be assured of the financial ability of any particular CLEC and, therefore, cannot rely on these section to adequately protect it rings hollow. Based upon this argument, the indemnity and liability provisions are ineffective and should be removed from the SGAT. If those provisions would adequately protect Qwest in other cases under the SGAT, they would provide the same protection here. Qwest's argument is nothing more than a smokescreen to mask its attempt to impose unnecessary and burdensome costs and delay on CLECs. Further, Qwest ignores that CLECs may have to demonstrate some form of financial ability before providing telecommunications services.

No state law requires a separate agreement of a landowner before Qwest can permit access by a CLEC to Qwest's ROWs in the absence of an express provision requiring such landowner agreement. Indeed, applicable FCC rules suggest that Qwest cannot impede a CLEC's access to ROWs.[29] Thus, the addition of Qwest's requirement to obtain an additional agreement of a landowner to provide notice and opportunity to cure cannot be interpreted as anything more than an impediment to a CLEC's access to ROWs.

Where Qwest demonstrates that certain ROW agreements expressly provide for obtaining the agreement of landowner to provide notice and an opportunity to cure before permitting "assignment" or other transfer, the Joint Intervenors would not object to inclusion in the SGAT certain limited and reasonable provisions designed to obtain and expedite such landowner agreement wherever necessary.[30] However, such provisions

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[28] *See, e.g.,* SGAT §§ 5.1, 5.9, 5.13.
[29] *See Bell South Second Louisiana Order*, ¶ 176.
[30] AT&T reserves its rights to challenge whether access mandated by the Act triggers such consent requirement and AT&T's rights to argue that federal law pre-empts such requirements.

must not be burdensome and must ensure that Qwest does not use its incumbent status to impose such landowner agreement requirements on landowners. This is especially important on going-forward basis, and Qwest should not now be permitted to avoid the objectives of the Act by entering in to agreements that, specifically impose requirements on property owners to obtain their agreement to a notice and opportunity to cure.

In addition to being unnecessary and burdensome, Qwest's consent and notice and opportunity to cure proposals are discriminatory because Qwest requires a CLEC to comply with obligations that are more burdensome to CLECs than to itself. Specifically, under Qwest's proposals, CLECs incur liabilities that are greater than those incurred by Qwest. Further, it is the Joint Intervenors' belief that Qwest does not obtain an agreement to provide notice and opportunity to cure in every instance in which a transfer of an interest from Qwest is made.

In addition, Qwest's argument ignores the fact that CLECs are similarly at risk of a "default" under ROW agreement by Qwest. Qwest is just as likely as any CLEC through its action or inaction to cause a default under the ROW agreement. Qwest's proposal does not afford a CLEC any protection, however. Qwest deems it unnecessary to require the agreement of landowner to provide notice and opportunity to cure to the CLEC, nor does Qwest deem it necessary to expressly agree that CLEC can perform under the ROW agreement in the event of Qwest's default. Such a proposal is discriminatory on its face.

Qwest may also assert that it should be indemnified against some risk that it believes it will be exposed to by affording CLECs access to these agreements. Such an indemnification obligation is unnecessary and improper. The FCC has required RBOCs

to provide access to its maps, plats and *other relevant data* to avoid "the need for costly discovery in pursuing a claim of improper denial of access."[31] It has not stated that such access is conditioned upon an indemnification agreement by the CLEC. Indeed, such a requirement creates unnecessary barriers to competition by requiring CLECs to negotiate with a separate agreement with Qwest, and significantly raises the cost of entry for CLECs by requiring the CLECs to bear the burden of frivolous litigation that is brought by landowners who have no expectation of privacy.

More fundamentally, because in the absence of an express provision restricting disclosure of a ROW agreement, there is no duty not to disclose the agreement, the CLEC's indemnification of Qwest is meaningless. In short, there is no risk, and because there is no risk to be managed, CLEC's agreement to indemnify is pointless. Put another way, with no risk to be avoided, neither party can be rationally expected to be able avoid such risk better than another. On an ongoing basis, however, Qwest is in a position to conclusively eliminate the risks of potential disclosure by seeking a definitive right to disclose its ROW agreements to third parties in future ROW agreements.

4. Rulings in Other Section 271 Proceedings Support the Joint Intervenors' Position.

In their preliminary rulings on these issues, the administrative law judges in Washington and Oregon have both considered and rejected Qwest's requirement that CLECs obtain landowner consent before access to ROW and MDU agreements will be afforded. Specifically, the Oregon ALJ stated:

> ILECs typically have had many decades of close ties to the communities and, especially, the businesses in the places in which they operate. The ability to obtain favorable access to private property does not rely upon

[31] *Local Competition Order,* ¶1223 (emphasis added).

coercive power alone. Active participation by employees in the civic life of the community has not only been encouraged, but many times supported by above-the-line expenditures, generating tremendous amounts of goodwill and providing access to business relationships not otherwise available. Qwest has not shown itself to be any different form other ILECs in this regard. This unique standing in the community does not evaporate with the advent of local exchange competition and it has provided Qwest with both a valuable portfolio of existing agreements and the ability to leverage further advantage for itself. Therefore, I agree with the findings of the Washington ALJ that Qwest's proposed resolution of this issue fails to satisfy the Act's requirements.

Although CLEC's are not entitled to automatically "piggyback" on private ROW and MDU agreements, they must be afforded reasonable access to those documents. Nondiscriminatory access to this information in Qwest's possession will help to enable a CLEC to negotiate on a reasonably equal footing with Qwest. I recommend that the Commission encourage the parties to continue to negotiate on this issue so that it will not be necessary to dictate the terms which the Commission will require for its recommendation of approval for Qwest's Section 271 authority.[32]

Similarly, the Washington ALJ concluded in her Draft Initial Order:

The Joint Intervenors and Qwest continue to negotiate this issue. While we hope the parties reach a mutually satisfactory agreement, after reviewing the parties' arguments, we believe that Qwest must provide CLECs access to private right-of-way agreements in a manner that is the least costly and burdensome to the CLECs. Qwest denies that it has ownership or control over ROWs established in agreements Qwest negotiated with private parties. Qwest further asserts that whether it has ownership or control is a matter of state law to be determined on a case-by-case basis. Regardless of whether Qwest has ownership or control, the FCC has required RBOCs to provide access to its maps, plats and other relevant data to avoid "the need for costly discovery in pursuing a claim of improper denial of access." *First Report and Order, ¶1223.*

Qwest further argues that access to private ROW agreements should not be an issue in determining its compliance with Section 271(c)(2)(B). Qwest is not correct. One of the evidentiary requirements Qwest must meet to establish its compliance with Checklist Item No. 3 is whether Qwest makes available to CLECs its maps, plats, and other relevant data. This is also an FCC requirement in the *First Report and Order. Id.* By

[32] In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996, Workshop 1 Findings and Recommendation Report of the Administrative Law Judge, issued October 17, 2000, p. 6.

failing to make available to CLECs private ROW agreements to which Qwest has access, Qwest creates unnecessary barriers to competition by requiring CLECs to negotiate with private landowners without knowing the terms of Qwest's agreement, and requiring CLECs to engage in potentially costly proceedings with both Qwest and the landowner to obtain eminent domain or right-of-way access.

On August 4, 2000, the parties submitted a schedule for negotiating this issue. We encourage the parties to continue their discussions. While the parties may reach an agreement on this issue, it appears that any agreement must allow for reasonable access to private right-of-way agreements. The issue appears to be access to an agreement to determine whether the CLEC wishes to gain access to an existing ROW. The CLEC cannot make this determination without seeing the document. Qwest's current proposal for providing a quitclaim deed, and requiring CLECs to obtain landowner consent before viewing the document, as well as pay significant fees before viewing the document, places an unreasonable and significant burden on CLECs. Qwest's existing proposal is not acceptable, and does not meet the requirements under Section 271(c)(2)(B) for nondiscriminatory access to ROWs.[33]

In her Revised Initial Order, the Washington ALJ concluded:

After considering Qwest's comments, we continue to believe that any proposal to resolve this issue is unacceptable if it places significant burdens on CLECs in order to obtain access to documents that identify the nature of Qwest's ownership or control over access to poles, ducts, conduits, or rights-of-way. We do agree with Qwest that the CLECs bear ultimate responsibility for negotiating the terms of access with the private landowners. However, the point at which CLECs must contact property owners remains in dispute. We are pleased that Qwest has modified the fees CLECs must pay and the time at which CLECs may view documents, which lessens the burden imposed in Qwest's original proposal. However, there appears to be continuing dispute as to how to approach agreements in which Qwest believes the property owner may have an expectation of privacy and in which CLECs believe Qwest may have exclusive access. We maintain our request that the parties continue to negotiate this issue and notify the Commission if they reach accord, or impasse, on this issue.[34]

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[33] *In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket No. UT-003022, Draft Initial Order, dated August 8, 2000, ¶¶ 35-38.

[34] Washington Revised Initial Order, ¶ 46.

As for the notice and opportunity to cure proposal, the Oregon ALJ concluded:

> However, while Qwest does, indeed, run a risk of loss of ROW if a CLEC breaches, there are, in my opinion, alternative means available that will not impede CLECs' abilities to negotiate ROW agreements: For example, Qwest may amend its own agreement with the landowner or offer the landowner a separate guarantee agreement. Unlike the CLECs, in the event that Qwest ultimately provides copies of its ROW and MDU agreements to CLECs, Qwest will be aware of all competitors' uses of Qwest's ROWs and will be able to act independently and expeditiously to protect its interests. I find that the proposed SGAT Exhibit D, Attachment 4, Consent Agreement Form, Paragraph 4, Notice and Cure Period, language is burdensome and discriminatory, and therefore recommend that the Commission encourage the parties to continue to negotiate on this issue so that it will not be necessary to dictate the terms which the Commission will require for its recommendation of approval for Qwest's Section 271 authority.[35]

For these same reasons, this Commission should reject Qwest's proposed consent and notice and opportunity to cure requirements and direct Qwest to provide CLECs with full and unconditional access to its ROW and MDU agreements.

5. SGAT Revisions Proposed by Qwest in Mr. Freeberg's Rebuttal Testimony in the Multistate.

In the Rebuttal Testimony of Thomas R. Freeberg filed in the Multistate Workshop, Qwest proposes revisions to various sections of Section 10 of the SGAT. Specifically, Qwest proposed the following revision to Section 10.8.1.3.1:

> 10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-

[35] In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996, Workshop 1 Findings and Recommendation Report of the Administrative Law Judge, issued October 17, 2000, p. 7.

> unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

ROW, as contemplated by the Act and the FCC is not limited to "real property interests," as Qwest defines that term. In addition, Qwest's definition of ROW in an MDU context is not consistent with the recent FCC *MTE Order.*

Further, Qwest proposed that Section 10.8.1.5 of the SGAT be revised to state that the phrase "ownership or control to do so" means the legal right, as a matter of state law, to "convey an interest in real or personal property." The Joint Intervenors still has concern regarding this Section. However, with the minor modification proposed below, this section would be acceptable.

Section 271(c)(2)(B)(iii) requires BOCs to provide to CLECs "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[36]

In its recent decision on rights of way, the FCC provides further clarity on the definition of ownership or control. Specifically, the FCC states:

> In order for a right of access to be triggered under Section 224, the property to which access is sought not only must be a utility pole, duct, conduit, or right-of-way, but it must be "owned or controlled" by the utility. In this regard, we have previously held that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law." Specifically, "the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way

[36] *BellSouth Second Louisiana Order*, ¶ 171; *See also* Section 251(b)(4), 47 U.S.C. §251(b)(4).

> to the extent necessary to permit such access."[37]
>
> * * *
>
> We conclude that our analysis in the *Local Competition First Report and Order* remains valid, and applies to ducts, conduits, and rights-of-way in buildings as well as to those in other locations.[38]

The Act and the FCC orders do not contemplate that Qwest will convey a legal interest in real or personal property to the CLEC under the requirements of Section 251(b)(4) or Section 271(c)(2)(B)(iii). The Act requires that Qwest afford the CLECs access to its poles, ducts conduits and rights-of-way. Therefore, according to the Act and the FCC's order, the ownership or control analysis that must be conducted under state law is to determine Qwest's ownership or control to afford the CLEC access to its right-of-way, easement or other interest in property, not, as Qwest suggests, to determine Qwest's legal right "to convey an interest" in property. The ability to afford access based upon an ownership and control analysis may not rise to the level of "conveying an interest." Accordingly, in the Multistate Workshop, AT&T recommended, and the Joint Intervenors recommend here, that Section 10.8.1.5 be revised as follows:

> Section 10.8.1.5 – The phrase "ownership or control to do so: means the legal right, as a matter of state law, to convey an interest in real or personal property or to afford the access to poles, ducts, conduits and rights-of-way contemplated by the Act.

In the recent Multistate Order, the outside consultant proposed a revised version of Section 10.8.1.5 that is consistent with AT&T's proposal, recommending that Section 10.8.1.5 be revised as follows:

> The phrase "ownership or control to do so" means the legal right, as a matter of state law, to (i) convey an interest in real or personal property or (ii) afford access to third parties as may be provided by the landowner to

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[37] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, released October 25, 2000, ¶ 85 (*"MTE Order"*).
[38] *Id.* at ¶ 87.

Qwest through express or implied agreements, or through Applicable Rules.[39]

6. Qwest Must Be Required to Grant Or Deny All Requests For Access To Poles, Ducts And Rights-Of-Way Within 45 Days of Receipt of the Request In Order For the SGAT To Be Lawful.

In Section 10.8.4 of the SGAT, in general, and in modified Section 2.2 of Exhibit D thereto, which is specifically referenced in Section 10.8.4, Qwest has proposed timelines for responding to requests for access to ROW that are contrary to the 45-day response established by the FCC. Qwest initially proposed a graduated timeline for responding to requests for access to ROW that extended its response deadline well beyond the 45-day time limit established by the FCC. In the SGAT Qwest recently filed in Arizona, Qwest now proposes that it be permitted for large ROW requests to provide an initial response approving or denying a portion of the order no later than 35 days following receipt of the order and continue approval or denial on a rolling basis until it has completed its response to such order. This proposal is similarly contrary to law.

Under the Act, the FCC Rules and relevant orders of the FCC, Qwest is required to respond to all requests for access to poles, ducts or ROW within 45 days, and there is no basis for excepting large requests from any other request for access to poles, ducts, conduit or ROW. Qwest's proposal is contrary to the Act, the FCC Rules and FCC rulings.

Indeed, FCC Rule 1.1403(b) which provides "[I]f access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th

[39] Multistate Final Report on Paper Workshop, p.18.

day."[40] Rule 1.1403(b) contains no exception based on the size of the order. Therefore, Section 2.2. of Exhibit D fails to satisfy the FCC rule.

The FCC affirmed this Rule in a recent decision in *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*; 15 FCC Rcd. 9563, June 7, 2000.

In *Cavalier,* the FCC was asked to address the numerous delays Complainant had suffered in obtaining the utility's approval to attach to its poles. In answer to the electric utility's claim that Rule 1.1403 only required it to respond 45 days if it were going to deny the application, the FCC concluded that under its rules the responding utility must grant or deny all requests for access to poles within 45 days. The FCC then directed the electric utility to provide immediate access to all poles for which permit applications had been pending for greater than 45 days.

The FCC's interpretation of its rules *Cavalier* is controlling here. Qwest's SGAT must be modified to require responses to all requests for access to poles, ducts and ROW within 45 days consistent with FCC Rule 1.1403.

Qwest argues that *Cavalier* should be read to permit it to respond to large requests in stages commencing within 35 days following its receipt of the completed application but continuing well beyond 45 days if necessary from Qwest's perspective. Qwest's view of the *Cavalier* decision is self-serving and inaccurate. As Qwest notes, the FCC's reference to large orders is contained within the following discussion in *Cavalier*:

> We have interpreted the Commission's Rules, 47 CFR § 1.1403(b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted." We conclude that Respondent is required to act on each permit application submitted by Complainant within 45

[40] 47 CFR 1.1403(b). *See also, In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company,* 15 FCC Rcd. 9563, June 7, 2000.

> days of receiving the request. To the extent that a permit application includes a large number of poles, respondent is required to approve access as the poles are approved, so that complainant is not required to wait until all poles included in a particular permit are approved prior to being granted any access at all. Respondent shall immediately grant access to all poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed with Respondent for longer than 45 days.

Qwest asserts that the FCC's use of the words "to act on" in the second sentence, permits Qwest to begin the process of responding to access requests within the 45 days, but that they may complete them outside of the 45-day period. This argument is strained at best. Qwest ignores the clear directive in the first sentence of the passage that a pole owner **"must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted."** Viewing the passage in its entirety, the conclusion is inescapable: Qwest must respond to all requests for access to poles, ducts, conduit or ROW within 45 days or the request will be deemed to be granted. As such, its SGAT must be amended to conform to this requirement.

In the *Local Competition Reconsideration Order*, the FCC made clear that "because *time is of the essence in access requests*, a utility must respond to a written request for access within 45 days. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day."[41] The FCC further held in its *Local Competition Reconsideration Order* that:

> Under the procedures adopted in the order, a utility must grant or deny a request for access within 45 days of a written request. If the utility denies the request, it must do so in writing, the reasons given for the denial must relate to the permissible grounds for denying access (e.g., lack of capacity, safety, reliability, or engineering concerns).[42]

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[41] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, CC Docket No. 96-98, FCC 99-266, ¶ 117 (released October 26, 1999).
[42] *Id.*, ¶ 17.

Again, this statement provides further affirmation of the 45-day time limit.

State Commissions are bound to apply FCC rules and orders and such rules and orders cannot be challenged in this proceeding.[43] The Hobbs Act vests exclusive jurisdiction in the courts of appeals to review FCC rules and orders. See 28 U.S.C. § 2342 (granting the court of appeals exclusive jurisdiction to determine the validity of FCC Orders).[44] To the extent Qwest or a state commission takes issue with rulings of the FCC, they must do so pursuant to the Hobbs Act. Therefore, state commissions may not alter the 45-day response period established by the FCC Rule. Qwest's SGAT must be revised accordingly.

In their preliminary rulings on these issues, the administrative law judges in Washington and Oregon have both considered and rejected Qwest's SGAT Section 10.8.4 and the references in Exhibit D and have enforced the 45-day response time found in the FCC Rule.

Specifically, the Washington ALJ in her Draft Initial Order stated:

> The Commission must determine whether Qwest is in compliance with the requirements of Checklist Item No. 3, including any FCC's rules and regulations and orders in effect at the time the application was filed. See *SBC Texas Order, at 22.* While Qwest is correct that the FCC rule does not specify whether the 45 day requirement applies to a request for a single pole or manhole, the rule can also be reasonably interpreted to refer to requests for a number of poles or manholes. The FCC has in fact interpreted the rule in that way. Although the *Cavalier Telephone* decision

[43] *See also Wilson v. A.H. Belo Corp., 87 F.3d 393, 397-400 (9th Cir. 1996)*, 87 F.3d at 396-98 (holding that all FCC rulings, whether in the form of rules, orders, or otherwise, are insulated from collateral attack under the Hobbs Act). Indeed, on this very point, the Eighth Circuit concluded that the "fact that the FCC assert[ed] . . . its authority in the commentary section of its First Report and Order as opposed to stating its position as a rule is immaterial." *Iowa Utils. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997), aff'd in part and rev'd in part,* 119 S. Ct. 721 (1999).

[44] *See U S WEST Communications v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1120 (9th Cir. 1999) (citations omitted) ("The FCC order [i.e., the *Local Competition Order*] is not subject to collateral attack in this proceeding. The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC. An aggrieved party may invoke this jurisdiction only by filing a petition for review of the FCC's final order in a court of appeals naming the United States as a party.")

was decided after Qwest filed its application with the Commission, the FCC's decision on the matter is eminently reasonable.

While Qwest may object to WorldCom walking away from an earlier agreement, WorldCom's action does not affect this decision. This proceeding is not an arbitration. In this proceeding, we must determine whether Qwest's SGAT and Interconnection Agreements and actions are in compliance with the Checklist Item and FCC rules and regulations. Qwest is not in compliance with Checklist Item No. 3 until it modifies its SGAT to provide a response to requests for poles, ducts, conduits, and rights-of-way within 45 days of receiving a completed application.[45]

In the Revised Initial Order, the Washington ALJ concluded further:

After reviewing Qwest's arguments, we continue to believe that it is appropriate to require a 45 day response time regardless of the size of the request. While it certainly is true that neither Section 251(b)(4) nor Section 271(c)((2)(B)(iii) specify a time limit for granting or denying access to poles, ducts, and rights-of-way, the FCC's rule and subsequent orders require a 45-day limit. RBOCs must comply with relevant FCC rules and orders to be compliant with Section 271.

While the FCC's rule is silent as to whether the response time varies depending upon the size of the request, nothing in the rule suggests that the size of the request should alter the 45 day limit. AT&T, World Com, and the Joint CLECs are correct in recognizing that the rule is explicit on the point that "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day."

The *First Report and Order* does suggest that "in evaluating requests for access, a utility may continue to rely on such codes as the NESC [National Electric Safety Code] to prescribe standards with respect to capacity, safety, reliability, and general engineering principles." However, allowing these factors in evaluating a request for access, or placing conditions on access is different than granting or denying the request within a given 45 day period. These standards can form the basis for denying the request, but not for changing the time frame in which the evaluation takes place. The 45 day rule is intended as a "swift and specific enforcement procedure that will allow for competition where access can be provided." Establishing guidelines for evaluation is not the same as having those guidelines drive the timetable for acting on a properly documented application from a CLEC.

[45] *In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, Draft Initial Order, dated August 8, 2000, ¶¶ 44, 45.

In its *Local Competition Reconsideration Order*, the FCC reiterated that "because *time is of the essence in access requests*, a utility must respond to a written request for access within 45 days. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day." This statement recognizes that the time frame for approving or denying a request is a primary policy consideration and specifies that the appropriate time frame is 45 days. The FCC further held in its *Local Competition Reconsideration Order* that:

> Under the procedures adopted in the order, a utility must grant or deny a request for access within 45 days of a written request. If the utility denies the request, it must do so in writing, the reasons given for the denial must relate to the permissible grounds for denying access (e.g., lack of capacity, safety, reliability, or engineering concerns).

Again, this seems to be an affirmation of the 45 day limit. It does not preclude the utility from denying the request on reasonable grounds, but it does affirm that the 45 day time frame is appropriate for making these determinations.

Finally, concerning the *Cavalier Telephone* case, one of the primary issues in that case was, as Qwest notes, a utility company that delayed access to its poles due to safety and other issues. However, the FCC's decision is clear that the number of poles requested does not alter the requirement to grant or deny access to poles, ducts, or rights-of-way within 45 days.[46]

Similarly, the Oregon ALJ concluded:

The resolution of this matter does not turn on a question of Oregon law. Furthermore, the matter suggests a region-wide standard should be applied, since part of the OSS performance measurements conducted by the ROC, will be based on Qwest's compliance with FCC rules with respect to the ordering process. I therefore recommend that the Commission look to the legal analysis already concluded in Washington State. In the Revised Initial Order, paragraphs 57-60, the ALJ summarizes her analysis of the law and concludes that a firm 45 day time limit does indeed exist and the number of poles requested does not alter the requirements of the rule. I recommend that the Commission encourage Qwest to further negotiate with the intervenors regarding the development of SGAT language that will comply with the FCC's rules and meet with

[46] *Id.*, Revised Initial Order, dated August 31, 2000, ¶¶ 56-60.

the Commission's approval.[47]

Accordingly, the Arizona Commission should reject Qwest's effort to alter its clear obligation under FCC's rules and orders and direct Qwest to revise its SGAT to require it to respond to request for access by approving or denying such requests within 45 days of receipt of the request.

B. Checklist Item 7 – Operator Services/Directory Assistance.

1. By Using the Concept of a "License," Qwest is Improperly Restricting CLECs' Access to the DA List Information, Contrary to the Requirements of Checklist Item No. 7.

The Arizona SGAT recently filed by Qwest provides in pertinent part as follows:

> 10.4.2.4 CLEC grants Qwest a non-exclusive **license** to incorporate CLEC's end user listings information into its directory assistance database. Qwest will incorporate CLEC end user listings in the directory assistance database. Qwest will incorporate CLEC's end user listings information in all existing and future directory assistance applications developed by Qwest.
>
> 10.5.1.1.2 Directory Assistance List Service -- Directory Assistance List Service is the bulk transfer of Qwest's directory listings for subscribers within Qwest's 14 states under a non-exclusive, non-transferable, revocable **license** to use the information solely for the purpose of providing Directory Assistance Service to its local exchange end user customers subject to the terms and conditions of this Agreement. See Section 10.6 for terms and conditions relating to the Directory Assistance List Services.
>
> 10.6.2.1 Qwest grants to CLEC, as a competing provider of telephone exchange service and telephone toll service, a non-exclusive, non-transferable, revocable **license** to use the DA List Information solely for the purpose of providing DA service to its local exchange end user customers, or for other incidental use by other carriers' customers, subject to the terms and conditions of this Agreement. As it pertains to the DA List Information in this Agreement, "Directory Assistance Service" shall

[47] *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Workshop 1 Findings and Recommendation Report of the Administrative Law Judge, issued October 17, 2000, p. 9.

> mean the provision, via a live operator or a mechanized system, of telephone number and address information for an identified telephone service end user or the name and/or address of the telephone service end user for an identified telephone number. Should CLEC cease to be a Telecommunications Carrier, a competing provider of telephone exchange service or telephone toll service, this license automatically terminates. DA List information is provided AS IS, WITH ALL FAULTS.

WCom objected to Sections 10.4.2.4, 10.5.1.1.2 and 10.6.2.1 of Qwest's SGAT, that states that both Qwest and the CLEC (Section 10.4.2.4) will grant one another a "license" to use end user listings and the directory assistance list information. A license is ordinarily considered to be a privilege to perform an act on the land or with the property of another. The licensor generally owns or controls the property. With regard to the expression of information, one's interest (ownership or control) is protected by copyright and the owner of the copyright gives a license to publish or use its expression.

Qwest does not have the right to claim a copyright of mere facts. The names, telephone numbers and addresses of Qwest's customers are simply facts, which are not subject to protection as intellectual property. Thus, licensing of these pieces of factual data is not legally protected and would not be in the public interest. Moreover, as between the parties to the SGAT, as a contractual matter, each party owns its respective end user and directory assistance listing data and it is improper for Qwest to claim an intellectual property right in such data supplied by the other party to the Agreement. Therefore, Qwest's attempt to claim licensing rights to the other party's data is inappropriate.

In the case of *Feist Publications, Inc. v. Rural Telephone Service Co,* the United States Supreme Court held that names, towns and telephone numbers of telephone utility's subscribers in the white pages of the utility's directory were not copyrightable

facts, as these bits of information were not original to the utility even if the utility had been first to discover and report the data.[48] The rational for that holding is applicable here. The nature of the information is the same. In that case, Rural Telephone refused to license its white pages listings to Feist for a directory that provided directory information for 11 different telephone service areas. Feist extracted the listings it needed from Rural's directory without Rural's consent and Rural sued for copyright infringement. The District Court granted summary judgment in favor of Rural and the Court of Appeals affirmed. The Supreme Court reversed, holding that Rural's white pages are not entitled to copyright, and therefore, Feist's use of them does not constitute infringement.

The Supreme Court, relying on Article 1, §8, cl. 8 of the Constitution which mandates originality as a prerequisite for copyright protection, concluded that Rural's white pages did not meet the constitutional or statutory requirements for copyright protection. The Court stated that while Rural had a valid copyright in the directory as a whole because it contained some forward text and some original material in the yellow pages advertisements, there was nothing original in Rural's white pages. Thus, the Court concluded that raw data were not copyrightable facts and the way in which Rural selected, coordinated and arranged those facts was not original in any way, stating "there is nothing remotely creative about arranging names alphabetically in a white pages directory."[49]

In the Colorado Section 271 workshop, Qwest agreed to remove all references to "license" in Colorado SGAT sections 10.4.2.4, 10.5.1.1.2 and 10.6.2.1, thereby

[48] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991)
[49] *Id.*, 499 U.S. at 346.

eliminating the impasse issue by revising these sections as follows:

> 10.4.2.4 CLEC grants Qwest access to CLEC's end user listings information solely for use in its Directory Assistance List Service, subject to the terms and conditions of this Agreement. Qwest will incorporate CLEC end user listings in the directory assistance database. Qwest will incorporate CLEC's end user listings information in all existing and future directory assistance applications developed by Qwest. Should Qwest cease to be a telecommunications carrier, by virtue of a divestiture, merger or other transaction, this access grant automatically terminates.
>
> 10.5.1.1.2 Directory Assistance List Service -- Directory Assistance List Service is the access to Qwest's directory listings for subscribers within Qwest's fourteen (14) states for the purpose of providing Directory Assistance Service to its local exchange end user customers subject to the terms and conditions of this Agreement. See Section 10.6 for terms and conditions relating to the Directory Assistance List Services.
>
> 10.6.2.1 Qwest grants to CLEC, as a competing provider of telephone Exchange Service and telephone toll service, access to the DA List Information solely for the purpose of providing Directory Assistance Service to its local exchange end user customers, or for other incidental use by other carrier's customers, or for other incidental use by other carrier's customers, subject to the terms and conditions of this Agreement. As it pertains to the DA List Information in this Agreement, "Directory Assistance Service" shall mean the provision, by CLEC via a live operator or a mechanized system, of telephone number and address information for an identified telephone service end user or the name and/or address of the telephone service end user for an identified telephone number. Should CLEC cease to be a telecommunications carrier, a competing provider of telephone Exchange Service or telephone toll service, this access grant automatically terminates.
>
> 10.6.2.1.1 Qwest shall make commercially reasonable efforts to ensure that listings belonging to Qwest retail end users provided to CLEC in Qwest's DA List Information are accurate and complete. All third party DA List Information is provided AS IS, WITH ALL FAULTS. Qwest further represents that it shall review all of its end user listings information provided to CLEC, including end user requested restrictions on use, such as nonpublished and nonlisted restrictions.

Despite this agreement, the original SGAT language is still in the SGAT recently filed by Qwest in Arizona. By retaining the concept of a "license" in these provisions,

Qwest is improperly restricting CLECs' access to the DA List information, contrary to the requirements of Checklist Item No. 7.

WCom also contends that, in Qwest's Arizona SGAT, DA List information is improperly restricted "solely" for purposes of providing DA to local exchange end users in both Sections 10.5.1.1.2 and 10.6.2.1. This issue was raised by WCOM in its Washington testimony. In Colorado, Qwest revised Section 10.5.1.1.2 to address this issue, but not Section 10.6.2.1. Indeed, in Washington, Qwest witness Margaret Bumgarner acknowledged that this issue was resolved and that Qwest had no intentions of restricting the use of DAQ lists to local service.[50] Accordingly, Qwest must incorporate the Colorado changes in Section 10.5.1.1.2 and eliminate the reference to "solely" in Section 10.6.2.1 to resolve this issue.

2. Qwest's New Forecasting Requirements are Inconsistent with its Current Position on Forecasting for UNEs.

Qwest has included in Sections 10.5.2.12 and 10.7.2.14 new forecasting obligations for CLECs with respect to the provision of operator services and directory assistance UNEs. These new provisions were inserted for the first time in the Multistate workshop. Since that time, Qwest has announced its intent to remove all forecasting requirements for UNEs. These new provisions are inconsistent with this announcement. Qwest needs to rationalize these two seemingly conflicting positions. In addition, Qwest needs to clarify how it intends to use these forecasts and whether it intends to build trunks to meet the CLECs' forecasted demand.

[50] Washington Transcript, Vol. 3, 6/21/00, pp. 213-214.

C. Checklist Item 10 - Access to Databases.

1. Qwest Refuses to Provide CLECs Full Access to Its CNAM Database. Only By Requiring Qwest to Provide Bulk Transfer Of The CNAM Database With Updates, Can The Commission Assure The Nondiscriminatory Access To This UNE That The Act Requires.[51]

The Act specifically requires Qwest to provide CLECs with nondiscriminatory access to its calling name assistance ("CNAM") database as an unbundled network element ("UNE").[52] The reason for this is apparent -- to win customers, CLECs must be able to provide not only basic local service, but also related services that are at least equal in quality to those provided by Qwest. Indeed, the Act and the FCC's regulations contemplate that new entrants will go further, leasing given unbundled network elements, and using them in innovative ways.[53] Consumers will thus be given the benefit of more choice, and competitors will be given a meaningful opportunity to compete by offering consumers new products, or by offering better service on existing products.

Qwest proposes to limit CLECs' access to the CNAM database to individual queries, as opposed to obtaining bulk transfer of all of the database. Specifically, the SGAT provides:

> 9.17.2.3 Qwest will allow CLEC to query Qwest's ICNAM database in order to obtain ICNAM information which identifies the calling party end user.
>
> 9.17.2.4 The ICNAM service shall include the database dip and transport from Qwest's regional STP to Qwest's SCP where the database is located. Transport from CLEC's network to Qwest's local STP is provided via Links, which are described and priced in the CCSAC/SS7 Section of this Agreement.

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[51] This issue has been raised by WCOM, not AT&T.
[52] *See* 47 U.S.C. § 251(c)(3); id. § 153(29) (defining "network element" to include "databases"); *see also Local Competition Order,* ¶¶ 484 and 485; *UNE Remand Order*, ¶ 406.
[53] *See e.g.,* 47 C.F.R. § 51.309(a).

WCOM opposes these provisions and has raised objections to these provisions in the other Section 271 workshops. In the case of the CNAM database, however, "per dip" or "per query" access is grossly inferior to the access Qwest itself enjoys and will create discriminatory advantages for Qwest. CLECs cannot effectively use the CNAM database unless they are able to populate and maintain their own databases, in the way that Qwest does for itself. Bulk access to the CNAM database would allow CLECs to structure their databases to suit their customers' needs as contemplated by the Act. The query-only access makes CLECs dependent on Qwest's systems and prevents CLECs from structuring their own calling name databases to provide efficient, equal-in-quality service to their customers. Only by requiring bulk transfer of the CNAM database with updates, can the Commission assure the nondiscriminatory access to this UNE that the Act requires.

Qwest's incorrectly claims that Rule 51.319 limits access to a per dip or per query basis. In formulating Rule 319, the Commission concluded that complete and global access to a LEC's CNAM database was not "technically feasible" over a signaling network.[54] Thus, in the First Report and Order and again in the UNE Remand Order[55] the FCC directed ILECs to provide "nondiscriminatory access to their call-related databases, including but not limited to, the CNAM database . . . by means of physical access at the signaling transfer point linked to the unbundled databases."[56] However, nowhere in its rules or its discussion of the calling name databases, did the FCC limit access to only that access that can be provided by means of the signaling network.

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[54] *Local Competition Order,* ¶ 485.
[55] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order, FCC 99-238, released November 5, 1999, ¶ 410 ("*UNE Remand Order*").
[56] *Id.*

Here, WCOM is *not* seeking access to the database over the signaling network, the type of access that the FCC addressed in its Local Competition and UNE Remand Orders and that Rule 51.319 seeks to regulate. Rather, as shown through the testimony of Michael Beach, global access *is* technically feasible by means other than the signaling network in much the same way WCOM populates its directory assistance databases.[57] Accordingly, Qwest must provide access to the entire database in order to satisfy the Act's nondiscriminatory access requirement.

The access WCOM seeks would permit it to provide Caller ID service to its customers with the same level of efficiency as Qwest. Limiting WCOM to per-query or "dip" access prevents WCOM from controlling the service quality, management of the database, or from adding new features, thereby allowing only the provision of inferior service.

CNAM allows the called customer premises equipment, connected to a switching system via a conventional line, to receive a calling party's name and the date and time of the call during the first silent interval in the ringing cycle. This is a very limited time frame within which to determine the name associated with the calling number. As the call reaches the terminating switch and a Caller ID request is made, the request must route through the network to reach the database holding the "name" information. WCOM must first determine which LEC owns the number, then route the call out to that LEC and back to make the "dip". If the LEC does not have the name, then exception

[57] Qwest also claims that WCOM misuses the term "technical feasibility" in light of the Supreme Court and Eight Circuit Court of Appeals pronouncement that it is used in Section 251(c)(3) to refer to "where" rather than "what". However, Qwest misconstrues WCOM's arguments with respect to technical feasibility. WCOM is not relying technically feasibility as justification for providing access to the entire CNAM database. Rather, WCOM submits that if nondiscriminatory access cannot be provided on the SS7 network, then non-discriminatory access should be offered off the network at another point where it is technically feasible.

handling procedures must be used to find the name and the result is finally returned to the called party. The time it takes to route the number request to the correct LEC's database to make the dip, return the request, and provide exception handling when the number is not found in the database cannot always be completed within the short ring cycle required. If, however, WCOM could maintain its own database, via global access to the LEC's database, a lengthy step of the process could be eliminated, allowing WCOM to provide service at least as well as Qwest provides for itself.

Thus, by enjoying superior access to its CNAM data—data that cannot be accessed or used anywhere else except on a per query basis—Qwest limits WCOM to an inferior service that it can provide more efficiently, quickly, and cheaply. For these reasons, Qwest's refusal to supply WCOM's with full access of its CNAM database is discriminatory under Section 251(b)(3) of the Act and must be remedied before Qwest is found to have complied with its obligations under Checklist No. 7.

Finally, in a decision in Case No. U-12540, In the Matter of the Application of Ameritech Michigan for Approval of Cost Studies and Resolution of Disputed Issues Relating to Certain UNE Offerings, dated March 7, 2001, the Michigan Public Service Commission adopted WorldCom's proposal to require Ameritech to offer a full download of the entire CNAM database so that CLECs can actively use the information in processing Caller ID with name service.

CONCLUSION

For all the reasons described herein, at this time, until Qwest revises its SGAT to be compliant with the Act and the FCC's rules and implementing orders, to provide the required nondiscriminatory access to poles, ducts, conduits and rights-of-way and to

comply with the FCC's 45-day response time, eliminates the licensing requirements, the limitations on DA Lists set forth in Sections 10.5.1.1.2 and 10.6.2.1, and the forecasting requirements, and grants bulk access to its CNAM database, Qwest has not satisfied and cannot satisfy Checklist Item 3 7, and 10.

Respectfully submitted this 6th day of April, 2001.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND AT&T LOCAL SERVICES

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